

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

393

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,451

United States Court of Appeals MILTON GOLIN,
of the District of Columbia Circuit

Appellee,

MAY 4, 1971

v.

Nathan J. Paulson
CLERK PHYSICIANS INTERNATIONAL PRESS,
INCORPORATED, et al.,

Appellants.

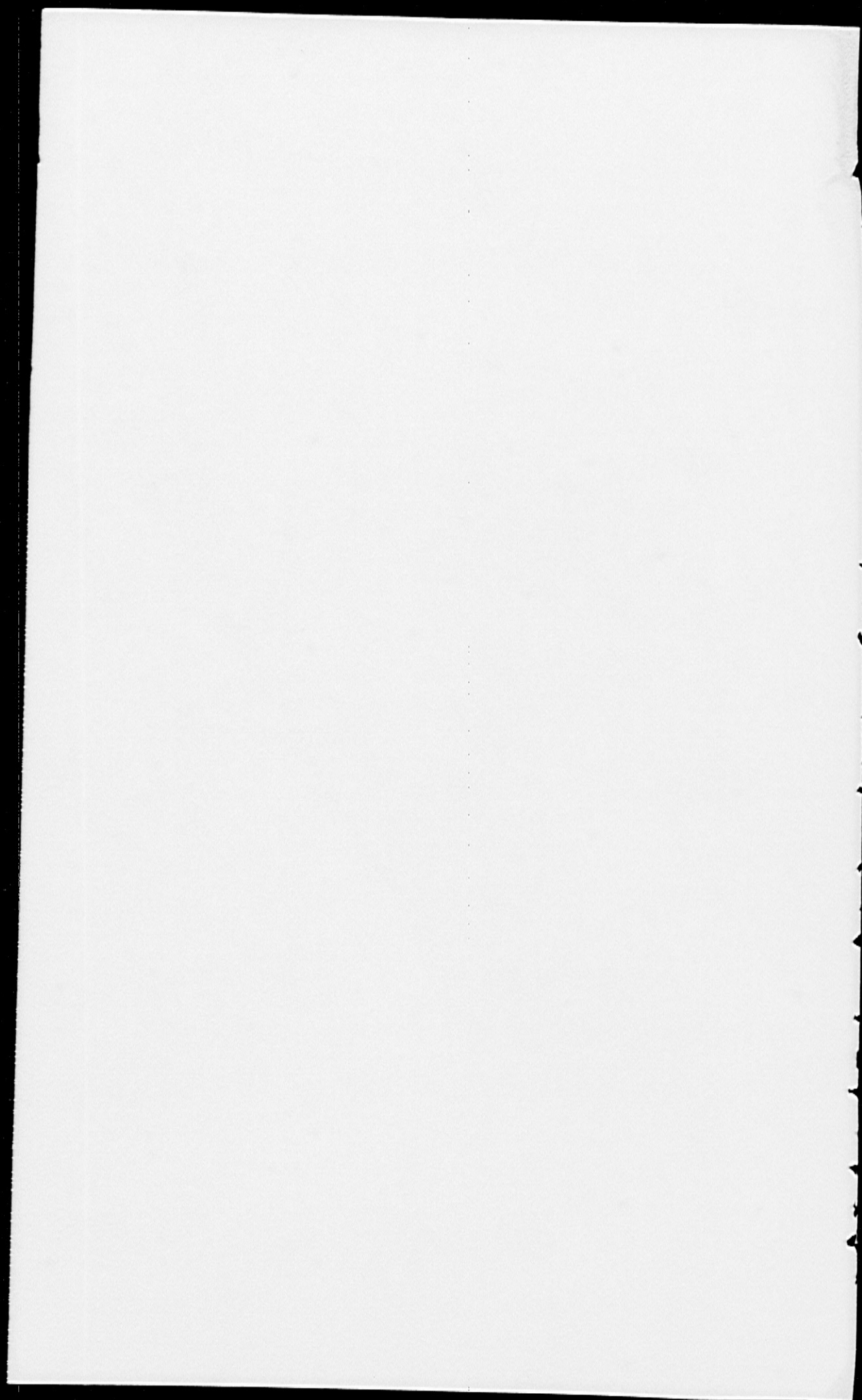
BRIEF OF PHYSICIANS INTERNATIONAL PRESS,
INCORPORATED, ET AL.

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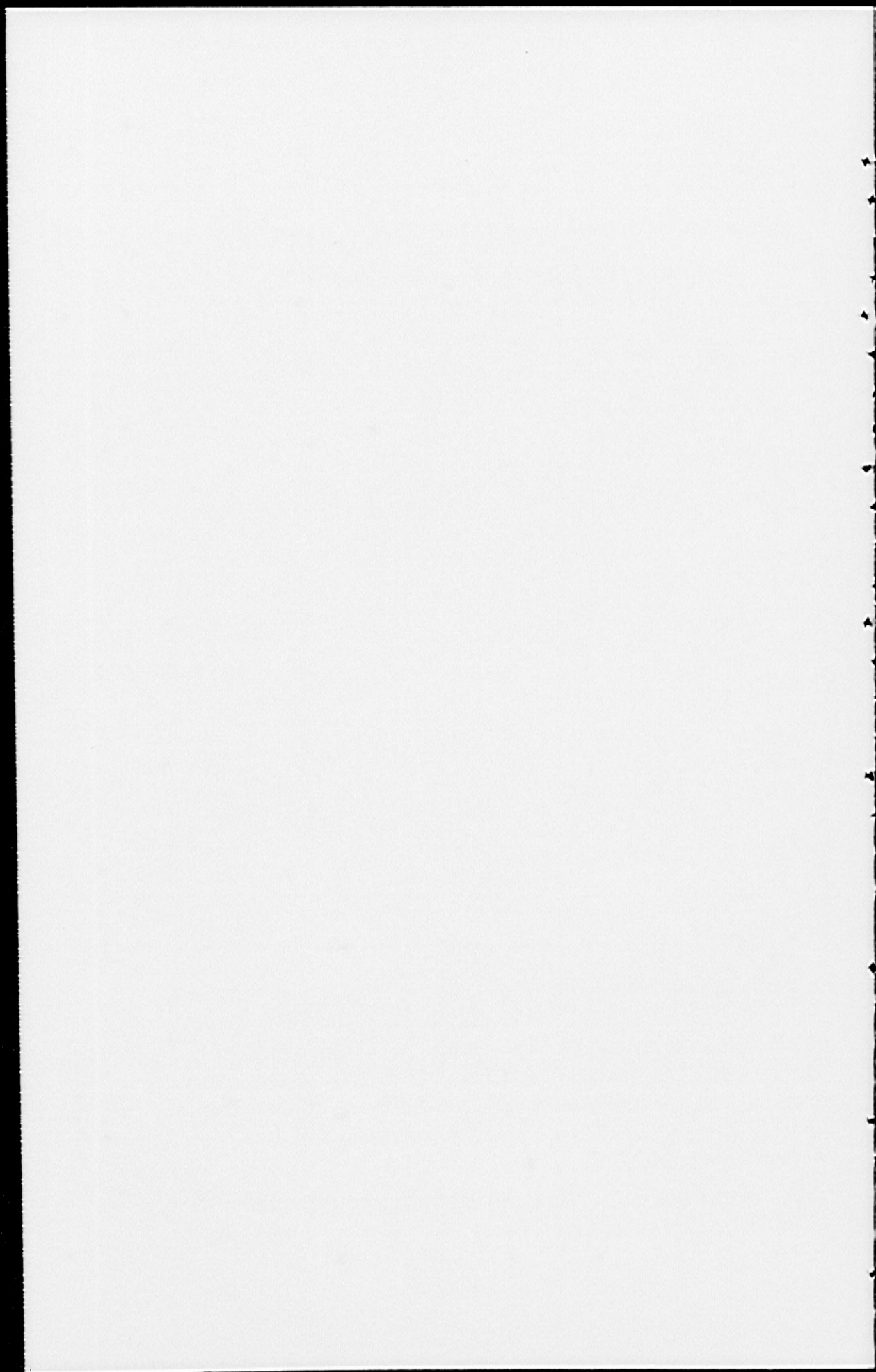
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,451

MILTON GOLIN,

Appellee,

v.

PHYSICIANS INTERNATIONAL PRESS,
INCORPORATED, et al.,

Appellants.

BRIEF OF PHYSICIANS INTERNATIONAL PRESS,
INCORPORATED, ET AL.

STATEMENT OF ISSUES PRESENTED

1. After finding that one of three shareholder-employees in a joint venture—a partnership operating in corporate form—had committed “a fundamental breach . . . going to the root of the contract,” and had “defaulted on the agreements,” did the trial court err in refusing to rescind the shareholder agreements and the issuance of stock to the defaulting shareholder?

2. Where the corporate defendants and counterclaimants have designated their Chief Executive Officer and majority

stockholder as the corporate officer in charge of the case and he is the officer most familiar with the facts leading up to the litigation, may the trial judge exclude that officer from the courtroom under the "rule on witnesses"?

3. Did the trial court err in directing a verdict for plaintiff on the defendants' counterclaim for libel, where plaintiff had accused the publications produced by the defendants of being unethical and had also accused the defendants of illegal conduct? Did this error prejudice the defendants' defense that they had cause to discharge the plaintiff prior to the expiration of his employment contract when one of the grounds relied upon for his dismissal was the publication of libelous statements concerning his employer.

The pending cases have not previously been before this Court under the same or similar title or in any manner whatever.

REFERENCES TO PARTIES AND RULINGS

These consolidated appeals arise from two separate trials in the District Court, one before Judge Sirica in April of 1970 and the second before Judge Gesell in September of 1970. Thus there are two separate sets of transcripts. All citations in this brief to either transcript, to the Opinion or to exhibits of either parties are to the page or pages of the Joint Appendix at which the cited item appears.

Judge Gesell's findings of fact and conclusions of law (the basis for the first issue presented for review) were delivered orally from the bench on October 8, 1970 and were transcribed in a separate volume, incorrectly styled "Judge's Ruling In Hearing on Motion."¹ Specifically, World Medical Reports, Inc. ("WMR") and Physicians International Press, Incorporated ("PIP") object to that part of

¹Cited herein as "Opinion."

the findings and conclusions which appear on page 13 (Appendix 13) concluding that Mr. Golin did not forfeit all rights as a shareholder in WMR and PIP.

The ruling excluding Mr. Scher from the courtroom (the basis for the second issue presented for review) was not transcribed. However, following an oral request for reconsideration and brief argument thereon, Judge Sirica reaffirmed his ruling. (Appendix 20-23)

The ruling directing a verdict for Golin on the libel counterclaim (the basis for the third issue presented for review) appears at Appendix 48-50.

The parties to these consolidated appeals whose names do not appear in the caption are World Medical Reports, Inc., Diagnosis News, Inc. and Mr. Meade E. Pace. They are all Appellants in No. 24,451 and Appellees in No. 24,943.

STATEMENT OF THE CASE

A. THE PROCEDURAL BACKGROUND

These consolidated appeals primarily involve the rights of the parties under several agreements, as follows:

1. A shareholders' agreement between Mr. Milton Golin ("Golin"), Mr. Meade Pace ("Pace"), Mr. Jack O. Scher ("Scher") and PIP;
2. An employment contract between Pace, Golin and PIP;
3. A shareholders' agreement between Golin, Pace, Scher and WMR; and
4. An employment contract between Pace, Golin and WMR. Also involved is a claim by Golin against WMR and PIP for slander and a claim by WMR and PIP against Golin for libel.

Distilling the rather complicated pleadings, as finally amended, Golin sued PIP, WMR, *Diagnosis News, Inc.* ("DNI") and Pace² on six counts, as follows:

1. Damages for alleged breach of the PIP shareholders' agreement and employment contract, in three respects: (i) wages earned prior to November 16, 1967, (ii) wages which would have been earned between November 16, 1967 and December 31, 1967 if the employment agreement had not been terminated by PIP, and (iii) dividends under the shareholders' agreement for fiscal years ended April 30, 1968, 1969 and 1970;
2. Damages for alleged breach of the WMR shareholders' agreement and employment contract in the same three respects;
3. An accounting of the profits of the newspaper *Diagnosis News*, which allegedly was fraudulently conveyed by WMR to DNI;
4. Damages, in quantum meruit, for services in preparing the pilot issue of *Diagnosis News*;
5. Injunctive relief to restore Golin as an officer and director of WMR and PIP and to void all corporate action taken from November, 1967 forward; and
6. Damages for slander.

WMR, PIP, Pace and DNI answered, denying any liability on the claims asserted by Golin; WMR and PIP also counter-claimed, seeking the following relief:

1. Rescission and/or reformation of the PIP and WMR shareholder agreements and the issuance of stock in PIP and WMR to Golin; and
2. Damages for libel.³

²His effort to sue Scher failed when service was quashed as having been improper. Pace was purely a nominal defendant in that no relief was requested against him.

³Other relief sought by the counterclaims was abandoned at or prior to trial.

The case went to trial on all issues before Judge Sirica and a jury on April 15, 1970. Because of the mixture of legal and equitable claims, it was stipulated by counsel, after consulting with the court, that the claims designated above as numbers 1,2,4 and 6 of Golin's Complaint (except for those matters in claims 1 and 2 relating to dividends) and claim 2 of the PIP-WMR counterclaim would be tried to the jury, while claims 3 and 5 of Golin's Complaint, the issue of entitlement to dividends, and claim 1 of the counterclaims would be tried to the court in equity.

At the conclusion of Golin's case the trial judge directed a verdict for WMR and PIP on Golin's claim of slander; at the conclusion of the corporations' case, he directed a verdict for Golin on their counterclaim of libel; the remainder of the legal counts were submitted to the jury. The jury awarded Golin damages under the employment contracts and one-half of the amount of damages he claimed in quantum meruit for services in the preparation of the pilot issue of *Diagnosis News*.

Following the jury verdict, for reasons here irrelevant, the trial judge declared a mistrial on the equitable claims which remained for decision by him and directed that those claims be retried before another Judge of the District Court. The jury verdict was not affected by that Order, and WMR and PIP appealed that verdict. That appeal is No. 24,451.

The retrial on the equitable counts commenced on September 8, 1970 before Judge Gesell. At the conclusion of the retrial, after submission of post-trial memoranda and oral argument, Judge Gessell held for WMR and PIP. He found that Golin had committed a "fundamental breach going to the root of the (shareholders') contract." Although refusing to rescind the contracts, he interpreted them to require a sale of Golin's stock because of his defaults and breaches thereunder.

Accordingly, he ordered Golin to surrender his stock to the corporations upon payment to him of the value thereof as of the end of the fiscal year in which he breached the

agreements. He further found that Golin was not entitled to any of the relief he had requested with respect to reinstatement as an officer and director, nor was he entitled to any of the profits of the newspaper *Diagnosis News*. Golin's appeal from that decision and the Judgment entered thereon on October 23, 1970, is No. 24,943.

On January 18, 1971 this Court consolidated the two appeals.

B. THE FACTUAL BACKGROUND

The opinion of Judge Gesell, which constituted his findings of fact, accurately summarized most of the background facts which gave rise to the litigation, as follows:⁴

"In 1966, Scher, who had had extensive experience with advertising and medical publications, decided to publish a series of medical newspapers designed to bring news of current developments to physicians in various specialties. He needed editorial and production assistance to carry out his concepts. Pace . . . was well known to Scher and agreed to participate. He had considerable editorial and production experience. [Appendix 91-94]. Scher was unwilling to rely only on one editor and at Pace's suggestion met in May 1966 with Golin . . . to interest him in the venture . . . Golin had requisite skills and medical publication experience. After some discussion, first with Pace and later with Scher . . . Golin also eventually agreed to participate. [Appendix 120-22].

"The project was still fairly tentative. There were no immediate formal agreements and only experience could demonstrate whether Scher, Golin and Pace could make the venture succeed. In a general way it was understood that a corporation, later known as PIP would be formed with \$1,000 paid in, Scher to have fifty percent and each of

⁴Citations to the record do not appear in Judge Gesell's opinion, but have been inserted in the quotations above.

the other two men twenty-five percent each. [Sept.Tr. 273-274]. Golin and Pace would remain temporarily employed elsewhere and moonlight to provide the editorial and production assistance necessary to start a monthly newspaper which was to be designated *Ob.Gyn. News* for distribution to obstetrical and related specialties. . . .

"A successful pilot edition was developed, primarily by Scher and Golin; it was well received. The first issue was offered in September. Success was almost immediate. . . . [B]y January, 1967, this publication was clearly destined to be a bi-monthly publication since there was ample revenue from advertising indicated available to carry it into the black. [Appendix 95-96, 98-99].

"Other publications directed to other specialties were discussed almost from the beginning by the three men. It was obvious that as the work increased more editorial time would be required and Scher, the president and publisher, would be increasingly involved with advertisers and business aspects of the growing enterprise. The parties from the outset had contemplated a full time commitment or its equivalent as and when the progress of the venture demanded. [Appendix 55-57, 97-101, 128].

"... At a very early date [Scher] felt that success was assured, and from time to time continued to urge both Golin and Pace to leave the security of their jobs and to come into the venture full time. [Appendix 99-101].

"A second newspaper, *Pediatric News*, was conceived and work on a pilot began sometime about October, 1966. Scher indicated he wanted control of this venture, and a new corporation was contemplated in which he would have fifty-one percent and Golin and Pace twenty-four and one-half percent each. This corporation, it was understood, was to produce *Pediatric News*, the second publication and subsequent similar ventures. It was organized and became known as WMR. Golin, Pace and Scher were to be named officers and directors of both WMR and PIP. [Appendix 56-57, 97-98].

"By this time it appeared that the newspapers would have some permanency and ultimately might be quite profitable. . . .

"While issuance of the stock had been authorized, there was still no formal papers. Eventually formal documents were prepared, and they were executed in May, 1967, although dated March 1, 1967, and purport to relate back to a date of September 1, 1966. These documents consisted of a shareholder agreement and an employment agreement for each corporation. The shareholder agreements specified the respective share allocations, the right of the three principals to serve as officers and directors, and a method of disposition of shares in the event of illness, death, or disability. The employment agreements specified that both Golin and Pace would be paid as editorial managers on a specified lineage basis for work produced, directly or indirectly by them, and that the two men could, on notice, jointly terminate the agreement or seek its modification as of December 31, 1967. [Appendix 131-72].

"The agreements were drawn up and executed as a single package. They were designed to achieve a single comprehensive plan, and they contain implicit references to one another. Furthermore, there is credible testimony by Scher and Pace that the shares were issued for the work which each participant was expected to contribute to the enterprise. [Appendix 102-08, 110-111, 124-125]. Correspondence discussing drafts back and forth between the parties, the dividend provisions of the agreement, the provisions governing disposition of stock under various contingencies and the context in which the parties entered into the agreements and proceeded from the outset all corroborate and reenforce the testimony of Scher and Pace. It was never contemplated by the three men that any of them could assume the status of a mere 'investor' and reap the benefits of the others' efforts. [Appendix 82, 102]. Work, not money, was to be the true capital of the enterprise. The venture was, in effect, a partnership doing business in corporate guise, a form of

business organization recognized by our Court of Appeals in such cases as *Helms v. Duckworth*, 249 F.2d 482.

"None of the formal agreements committed any of the three men to devote full time to the enterprise in so many words. The work load, however, kept increasing. A third newspaper, *Diagnosis News*, for internists, was by this time in prospect and other similar ventures were discussed. [Appendix 73-74, 214] [I]t was recognized by each of the three men from the outset that as the work grew and success became apparent, the venture would require a commitment of full time and effort by each participant to carry the ventures forward. The time had come, and pursuant to this mutual understanding, Golin and Pace left their previous private employment and became more or less full-time involved in the publications around June or July of 1967.

"Frictions soon developed Golin, standing on editorial pride, often resented Scher's slightest suggestions and instructions and Scher found Golin unduly obstinate and impractical. Pace, caught in the middle, tended to support Scher when issues came into sharp discussion and Golin grew to resent Pace for this reason. . . . Golin was unreasonably suspicious and intransigent. . . . Golin became increasingly sensitive to real and often imagined slights until his willingness to continue ceased, and he seized on a flimsy incident concerning masthead credits to offer his resignation as editorial manager. This resignation some four months after the signing of the agreement [to become effective on December 31, 1967] . . . was a fundamental breach by Golin going to the root of the contract.

"Golin worked on to some extent after his resignation until [November] '67, but his conduct was detrimental to the business in many respects. He made false accusations and disrupted the staff of the Washington office. [Appendix 113-19, 27-28]. [In November, 1967] Golin was removed from his noncompensated formalistic duties as an officer and director of both companies, [and was

removed as one of the joint editorial managers of the publications [Appendix 212-13]."

On a number of significant issues the testimony was in sharp dispute. Accordingly, Judge Gesell made specific findings on the issue of credibility, as follows:

"There is much conflict in the testimony concerning various episodes leading to Golin's resignation and subsequent developments. While each party to the controversy had discussed these matters with some benefit of hindsight and self-interest, *the Court finds Golin the least credible by far. There are numerous inconsistencies and contradictions in his testimony, and the Court considered many of his responses evasive and unreliable.* Golin contends that he was harassed by his colleagues to the point where he was forced to resign [Appendix 57, 67-68]. The evidence does not support this contention by anything approaching a preponderance of the evidence. Golin's temperament proved to be such that he could not work effectively with the other two men without being the dominant editorial force. Neither his stock interest, his title, his contract, his talent, nor anything else made this logical, and it was certainly not a role that had been contemplated for him by his two associates when the venture was organized or as it continued."

ARGUMENT

WITH RESPECT TO APPEAL NO. 24,943.

**I. AFTER FINDING THAT GOLIN COMMITTED A
FUNDAMENTAL BREACH GOING TO THE ROOT
OF HIS CONTRACTUAL COMMITMENTS, THE TRIAL
COURT ERRED IN NOT ORDERING THE CON-
TRACTS RESCINDED**

As noted above, Judge Gesell found, in Golin's resignation just a few months after signing the WMR and PIP shareholder agreements, a "fundamental breach by Golin going to the root of the contract." (Appendix 8). Elsewhere in his opinion, Judge Gesell characterized that resignation as "in violation of his [Golin's] commitment to the other two shareholders." (Appendix 10.) Abundant evidence, summarized in Judge Gesell's opinion, supports those findings. Yet Judge Gesell refused to order the shareholder agreements and stock issuance to Golin rescinded.⁵ He found that WMR and PIP had failed to prove that Golin had obtained his stock by fraud, and on that basis alone he refused the requested rescissory remedy (Appendix 11). However, in so doing, he ignored the alternate grounds on which the corporations requested that remedy, and in view of his own findings, the corporations were clearly entitled to rescission.

In the most frequently cited case in the common law on the availability of the remedy of rescission, the court stated that rescission is permitted,

"for failure of consideration, fraud in making the contract, for inability to perform it after it is made, for repudiation of the contract or an essential part thereof, and for such a breach as substantially

⁵He did interpret the contracts to require Golin to sell his shares back to WMR and PIP as a result of Golin's breach; he fixed the date for the valuation of Golin's shares as of the end of the fiscal year in which Golin breached the contracts.

defects its purpose. It is not permitted for a slight, casual or technical breach, but, as a general rule, only for such as are material and wilful, or, if not wilful, so substantial and *fundamental* as to strongly tend to defeat the object of the parties in making the contract. Failure to perform in every respect is not essential, but a failure which leaves the subject of the contract substantially different than what was contracted for is sufficient [I]n case of repudiation, or of a breach going to the root of the contract, unless the damages can be ascertained with reasonable certainty, *rescission is a matter of right*, with restitution instead of compensation."

Callinan v. Powers, 199 N.Y. 268, 92 N.E. 747 (1910). See also, 12 *Williston on Contracts* §§ 1455, 1457 (Jaeger ed. 1970); Restatement, *Contracts* § 354, and illus. 5 therein; *Black on Rescission and Cancellation*, § 158.159 (1916). Since the trial court found, in the precise words of *Callinan*, a "fundamental . . . breach going to the root of the contract," then, also in the words of *Callinan*, "rescission is a matter of right."

The essential consideration for Golin's receipt of a stock interest in WMR and PIP was his expressed willingness to render services on a substantially long-term or permanent basis to those corporations. He was not an investor risking his capital on the results of the labors of others; his total capital contribution in WMR and PIP was \$495, his pro rata share of the ritualistic \$2,000 needed to organize the two corporate entities (Appendix 64, 110-11, 23-24). Instead he and his co-venturers were joining together to build a business and expected to profit, if at all, from the collective efforts of each of the venturers. Golin's voluntary resignation substantially denied to the corporations and to his co-venturers that for which they bargained in offering him an equity interest. In precisely these circumstances, courts of equity have frequently ordered rescission of stock transferred to the defaulting party. In *Maytag Co. v. Alward*, 112 N.W. 2d 654 (Iowa, 1962), a case quite

close in point to the instant case, an employee exercised two stock options and then resigned. He had worked two years and seven months of the three years required by the first option agreement; by the second option agreement he was obligated for another three years after the period covered by the first option agreement expired. The court held that the employee's voluntary termination of employment was

"such a repudiation and breach of the option contracts and amount to such failure of consideration for the sales of stock as entitled plaintiff [corporation] to restitution of the stock upon payment of the purchase price . . . *the remedy of rescission and restitution of property has most frequently been applied when property has been transferred in consideration of an agreement, which is later repudiated or breached . . .* (Emphasis added).

See also, e.g., *Converse v. Schmidlapp*, 264 App.Div. 381, 35 N.Y.S. 2d 486 (1942); *Strand Building Corp. v. Russell & Saxe, Inc.*, 36 Misc. 2d 339, 232 N.Y.S. 2d 384 (1962); *Therm-O-Proof Insulation Mfg. Co. v. Hoffman*, 329 Ill. App. 645, 69 N.E. 2d 725 (1946) ("unconscionable" to permit defendant who had voluntarily quit his job to keep stock issued in consideration of his undertaking long-term employment); *Hillside Cemetery Assn. v. Holmes*, 97 Minn. 261, 105 N.W. 905 (1906); cf. *Michigan Crown Fender Co. v. Welch*, 211 Mich. 148, 178 N.W. 684 (Mich. 1920). In view of the trial court's specific findings that "the parties from the outset had contemplated a full time commitment," (Appendix 5; see also p. 8), and that "the shares [of stock] were issued for the work which each participant was expected to contribute to the enterprise . . . [w]ork, not money, was to be the true capital of the enterprise" (*id.*, p. 12), a classic case for rescission was made by the corporations.

WITH RESPECT TO APPEAL NO. 24,451.

II. THE COURT ERRED IN EXCLUDING FROM THE COURTROOM THE CORPORATE OFFICER IN CHARGE OF THE LITIGATION AND MOST FAMILIAR WITH THE FACTS.

At the beginning of the April trial, Golin's counsel asked the trial court to invoke the rule on witnesses and pursuant thereto to bar Scher—who was to testify as a witness for WMR and PIP—from the courtroom.⁶ Judge Sirica, after first ruling that Scher would not be excluded, reversed himself and ordered Scher out of the courtroom during the taking of testimony. Counsel for WMR, PIP and DNI informed the court that Scher was the Chief Executive Officer and majority shareholder of those corporations, that he was therefore the real party in interest, that he was the individual most familiar with the facts of the case and that he had been designated by those corporations as the officer in charge of the litigation. Nevertheless, the court held that Scher was to be excluded (Appendix 20-23).

The court based its ruling upon *United Dentists v. Virginia*, _____ Va. _____, 173 S.E. 508 (1934). In fact, that case clearly demonstrates that the court erred. In *United Dentists*, the trial judge correctly ruled that only one of two corporate officers could remain in the courtroom during the taking of testimony, but he permitted the attorney for the corporation to make the choice. The court held:

“Where the party is necessarily absent, his agent whose presence is required by counsel on account of his knowledge of the case, should not be excluded. Where the defendant is a corporation, it is not error [to exclude an officer], *unless it appears that he has been put in control of the litigation.* (Emphasis added.)

⁶As noted above, Golin had originally sought to make Scher a party, but was unable to effect service on him.

Numerous other cases have held that it is error to exclude from the courtroom the corporate officer put in charge of the litigation or the corporate officer most familiar with the facts and thus best able to assist counsel during the course of the trial. *Mississippi Rice Growers Assn. v. Pigott*, 191 So.2d 399 (Miss.1966); *City Loan & Savings Co. v. White*, 73 N.E. 2d 811 (Ohio 1947); *Sherman v. Irving Merchandise Corp.*, 26 N.Y.S. 2d 645 (Sup. Ct. 1941); *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S.W. 879 (1897). All of these cases were called to the attention of the court, but it nevertheless excluded Scher. (Apr. Tr.79-81.) Cf. *Xenakis v. Garrett Freight Lines, Inc.*, 265 P.2d 1007 (Utah 1954); *District of Columbia v. Flagg*, 42 App. D.C. 73 (1914).

III. THE COURT ERRED IN DIRECTING A VERDICT FOR GOLIN ON THE CORPORATIONS' CLAIM FOR LIBEL

The documents relied upon in the first trial as libelous are Def.Ex.49, Def.Ex.50, and Def.Ex.87. (Appendix 205, 206, 216).

In Def.Ex.49 (Appendix 205), Golin wrote to one Dr. Ralph Crowley, on September 21, 1967:

"Barring the unlikely prospect that a new contract can restore clear and separate divisions of operating responsibility I will be staying in Washington, probably with *ventures in more ethical medical journalism*." (Emphasis added.)

In Def.Ex.50 (Appendix 206), Golin wrote to fifteen named people, on September 22, 1967, stating:

"Barring the unlikelihood of a new contract restoring undiluted responsibility, I will be staying in Washington, probably with *ethical ventures in medical journalism*." (Emphasis added.)

In Def.Ex.87 (Appendix 216), Golin wrote to one Dr. Soper, on January 20, 1968, "But even before the publishing corporation illegally breached my contract on Novem-

ber 13, *my mail was being illegally diverted* as others in the office were hastening to assume control." (Emphasis added.)

On their face, Def.Ex.49 and 50 charge that the publications of WMR and PIP are unethical. The only defense offered by Golin was that he used the word "ethical" as a synonym for "prescription" and was referring, in both letters, to newspapers which accept advertising for ethical drugs as opposed to proprietary drugs. (Appendix 19-20, 25-26, 32). He did not assert the defense of truth or fair comment or any other defense.

Thus, without any further testimony, a jury question was created to resolve the claimed ambiguity of the letters, yet Judge Sirica directed a verdict for Golin on the counterclaim.⁷ In a case virtually on all fours with the instant case, where a letter written in the context of a termination of a business relationship contained ambiguous language which, under one construction, arguably libeled the plaintiff, the court held:

"... the question should be left to the jury to determine whether or not the letter in question merely announced the dissolution or cessation of business relations between plaintiff and the defendant, or whether or not it went further and through additional words conveyed to those to whom it was published the imputations and insinuations alleged in the complaint."

⁷ Although "ethical" is used by those in the drug or related businesses to distinguish prescription from proprietary drugs, as used in Def. Ex. 49 and 50 it can not be reasonably read to refer to prescription drugs. In both quoted sentences, Golin used the word as an adjective modifying the type of venture. Drugs can be ethical or proprietary; ventures in medical journalism can be ethical or unethical. In other documents introduced in evidence, when Golin was in fact referring to drugs or drug manufacturers, he used the word "prescription" rather than the word "ethical". (Def. Ex. 51, 85, Appendix 207, 215). Thus, in the context of the disputes between Golin, Scher and Pace, a clear jury issue as to intent was presented.

Brooks v. Jack's Cookie Co., 122 F. Supp. 113 (E.D.S.Car. 1954). *A fortiori*, where the letter is libelous on its face and the ambiguity is created by the defense, the issue is for the resolution of the jury.

In the case at bar there was much more than the mere letters however; there was clear and convincing evidence that the letters were meant to be and were understood as libelous. Dr. Crowley, the recipient of Def. Ex.49, testified as follows:

"Q. . . You have seen this letter have you not—to refresh your recollection (handing letter to witness).

A. Yes, I have seen this letter.

Q. This letter, Dr. Crowley, is marked Defendant's Exhibit 49 in evidence. I call your attention specifically, sir, to the paragraph or the sentence in which Mr. Golin says:

"I will be staying in Washington, probably with ventures in more ethical medical journalism."

Can you tell us, sir, how you understood that sentence?

A. I found it very difficult to understand that sentence in any literal sense. *It seemed to me that he was making a kind of an attack upon Ob.Gyn. News.*

Q. You did not take the word "ethical" in the context he used it to refer to prescription drugs?

A. *It never occurred to me to think of drugs in this connection, from my knowledge of the journal.*" (Appendix 38-40).

Concerning the meaning of the word "ethical", one of Golin's own witnesses testified as follows:

Q. You also testified that there is a use of the word ethical as relating to drugs, is that correct, ethical drugs versus proprietary drugs?

A. Yes.

Q. Is that term frequently or normally attached to newspapers—ethical newspapers and proprietary newspapers?

A. Not to my knowledge. No.

* * *

Q. One attaches, though, the word "ethical" to drugs as opposed to newspapers. Is that correct?

A. Yes, or manufacturers of drugs. (Appendix 33-34).

Scher testified:

Q. Have you ever, sir, heard the expression ethical attached to a newspaper or a periodical as opposed to a drug?

A. Never.

Q. Is there such a thing as an ethical medical periodical?

A. Not to my knowledge. (Appendix 34-35).

In fact, during the examination of Mr. Golin, Judge Sirica ruled several times that the very issue he took away from the jury was one for the jury to determine. When Golin was asked by his counsel which meaning of the word "ethical" Golin had intended, the court ruled: "The jury will have to draw their own inferences". (Apr.Tr.44) Later, during cross examination, the following exchange occurred:

"Mr. Golin you have heard us already read from the Random House dictionary that the word 'ethical', in addition to its normal meaning of moral and proper conduct, has a third meaning—will you tell us please?

Mr. Lambeth: Your Honor, I object to counsel taking it upon himself to decide what the normal meaning is, there are several meanings to the word 'ethical'.

The Court: *I think the jury has enough common sense to know what the word 'ethical' means.* (Appendix 24-25).

* * *

The Court: The paragraph was read to the jury by counsel and I think the jury can make up their own minds; the jury should decide. (Appendix 25-26)."

Moreover, whatever ambiguity may reside in Golin's reference to ethical ventures in medical journalism, there is no ambiguity in the libel contained in Def.Ex.87 (Appendix 216). In that letter he accused the counterclaimants of "illegally" diverting his mail, a charge of the commission of a crime (18 U.S.C. Section 1708). The evidence demonstrated that the charge was baseless (Appendix 21, 31-32), and, of course, to untruthfully accuse another of a crime in writing, is a libel.

Notwithstanding the clear impact of the writings, the abundant testimony quoted above, and the Trial Judge's repeated rulings during the course of the testimony that the matter was one for the jury to consider, at the end of the corporation's case Judge Sirica directed a verdict for Golin. He stated:

"If you had an individual being allegedly libeled, I think you would have something maybe in your favor, but I am not so sure that you are too strong in connection with the publication being libeled." (Appendix 45-46).

Of course, there is absolutely no accepted principle or precedent which requires a higher degree of tolerance to libel for corporate plaintiffs who publish newspapers than for individual litigants. "The legal principles constituting the law of libel or slander are the same whether corporations or individuals are involved." *Kemart Corporation v. Printing Arts Research Lab.*, 146 F.Supp.21, 22 (S.D.Cal.1956), *affd.* 269 F.2d 375, (9th Cir. 1959), *cert.den.*, 361 U.S. 893.

In fact:

"The right of a corporation to sue in libel has existed for over a century The traditional rule recognizes that publications of a statement concerning the operation of a corporation which would be libelous

per se if directed at an individual are similarly actionable by the injured corporation As in the case of an individual the action may be brought without proof of special damages."⁸

Note, *Libel and the Corporate Plaintiff*, 69 Col. L. Rev. 1496, 1497 (1969) and fn. 9-17.

In support of the novel ruling that WMR and PIP "would have had something" if they had been individuals but lost that "something" by being corporations, Judge Sirica expressly stated, in relating a story about a case in which he had represented Walter Winchell, that newspapers are supposed to be "thick skinned" (Appendix 47), and therefore a different standard of tolerance is demanded of them in an action when they charge libel.

Even Golin's lawyer conceded that a jury issue was presented when he said in argument, "and granted in the most favorable light of the corporation, this (Def.Ex.49 and 50) (Appendix 205-206) *could be interpreted two ways.*" (Appendix 48). Since that is an almost perfect quote of the test to ascertain whether or not a jury issue exists (*Shewmaker v. Capital Transit Co.*, 79 U.S.App.D.C. 102, 143 F.2d 142 (1944)), the trial judge could not properly direct a verdict on the issue. Notwithstanding this admission, Judge Sirica, with some apparent doubt, ruled: "I may be wrong—and if I am it is a matter that the Court of Appeals can decide at the proper time—but I am going to take that issue away from the jury. . ." (Appendix 48).

It belabors the obvious to demonstrate at any length that the charges of unethical and illegal behavior at least make out a jury case of libel *per se*. In *Sperry Rand Corp. v. Hill*, 356 F.2d 181 (1st Cir. 1966), the court of appeals held that a jury could find that an inference that a party was "unethical" was libel *per se*. A corporation is libeled if its credit, property or business reputation is injured. *Dip-*

⁸While all of the claimed libels are libel *per se*, there is substantial testimony as to the actual damages caused by the libel (Appendix 35-38).

lomat Electric Inc. v. Westinghouse Electric Supply Co., 378 F.2d 377, (5th Cir. 1967).

"It is well settled . . . that words which falsely charge one with unfitness in the way of a profession or trade are actionable *per se*; and as a logical matter it should be immaterial whether the charge of unfitness in the way of profession or trade is charged positively and directly by words of clear and unmis-takeable meaning, or only indirectly and by means of innuendo; so long as the words are understood by third persons to make the charge the affect from the standpoint of damage done may be calculated to be the same; a hidden charge made by insinuation and innuendo may inflict graver injury and injustice than a direct and specific accusation, which if false may be more easily met and refuted. *Lesesne v. Willingham*, D.C., 83 F. Supp. 918; *Sandifer v. Electrolux*, 4 Cir., 172 F.2d 548."

Brooks v. Jack's Cookie Co., *supra*, at 114.

Not only did the trial court err in the law, but the procedure adopted of directing a verdict before decision by the jury has frequently been condemned. The proper procedure, as stated by Professor Moore is as follows:

"Where the trial court has any doubt as to whether to grant the motion for a directed verdict, the better practice is for the judge not to direct a verdict but to reserve decision and let the jury bring in a verdict. Then the trial judge is in a position to consider a post-verdict motion under Rule 50(b) and upon such motion he can set the verdict aside, if he thinks proper, and grant judgment notwithstanding the verdict. Furthermore, the appellate court is also then in a position to reinstate the verdict, if it disagrees with the trial court's disposition of the motion under Rule 50(b) and another trial may thus be avoided."

5 *Moore's Federal Practice*, 50.05(3) (2d ed.) This Court has frequently admonished the District Court to follow this procedure. See, e.g. *Shewmaker v. Capital Transit Co.*, 79

U.S.App.D.C.102, 143 F.2d 142 (1944), *Williams v. Greenblatt*, 106 U.S.App.D.C.335, 272 F.2d 564 (1959), *Smith v. Steward*, 110 U.S. App.D.C. 242, 292 F.2d 735 (1961).

The trial court's decision to direct a verdict for Golin on the Corporation's libel claim prejudiced the Corporations not only in connection with that claim but also in connection with Golin's claim for damages on account of the alleged breach of the PIP and WMR employment agreement. As noted in the Statement of the Case, Golin was fired from his position as Joint Editorial Manager on November 13, 1967. His resignation from that position, submitted in August, 1967, was to become effective at year end, 1967. Thus, he claimed damages for the period November 13 to December 31, based on the amount of compensation he would have been paid under the employment contracts had his services not been terminated. In defense of this claim, the Corporations argued that Golin had libeled them and that this treacherous behavior constituted sufficient cause for dismissal. (Appendix 29-30). By directing a verdict for Golin on the libel count, the trial Judge indicated to the jury that he did not think reasonable men could find that Golin had libeled his employers, and by this action gutted the corporations' argument that they had cause for dismissal. The jury awarded Golin the entire amount he claimed on account of fees which he would have earned had he not been discharged. Appellants contend, therefore, that the trial Judge's error in directing a verdict on the libel count so prejudiced the Corporations in connection with Golin's breach of employment claim that both matters should be returned to the District Court for retrial.

CONCLUSION

For the reasons herein stated, the Court should reverse No. 24,943 and direct the District Court to enter a Judgment granting rescission of the shareholder agreements and the transfer of stock in WMR and PIP to Golin upon restitution to him of the purchase price of his shares, and the Court should reverse and remand No. 24,451 for a new trial.

Respectfully submitted,

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,451

MILTON GOLIN,

Appellee,

v.

PHYSICIANS INTERNATIONAL PRESS, INC., WORLD
MEDICAL REPORTS, INC., DIAGNOSIS NEWS, INC.
AND MEADIE E. PACE,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR APPELLEE

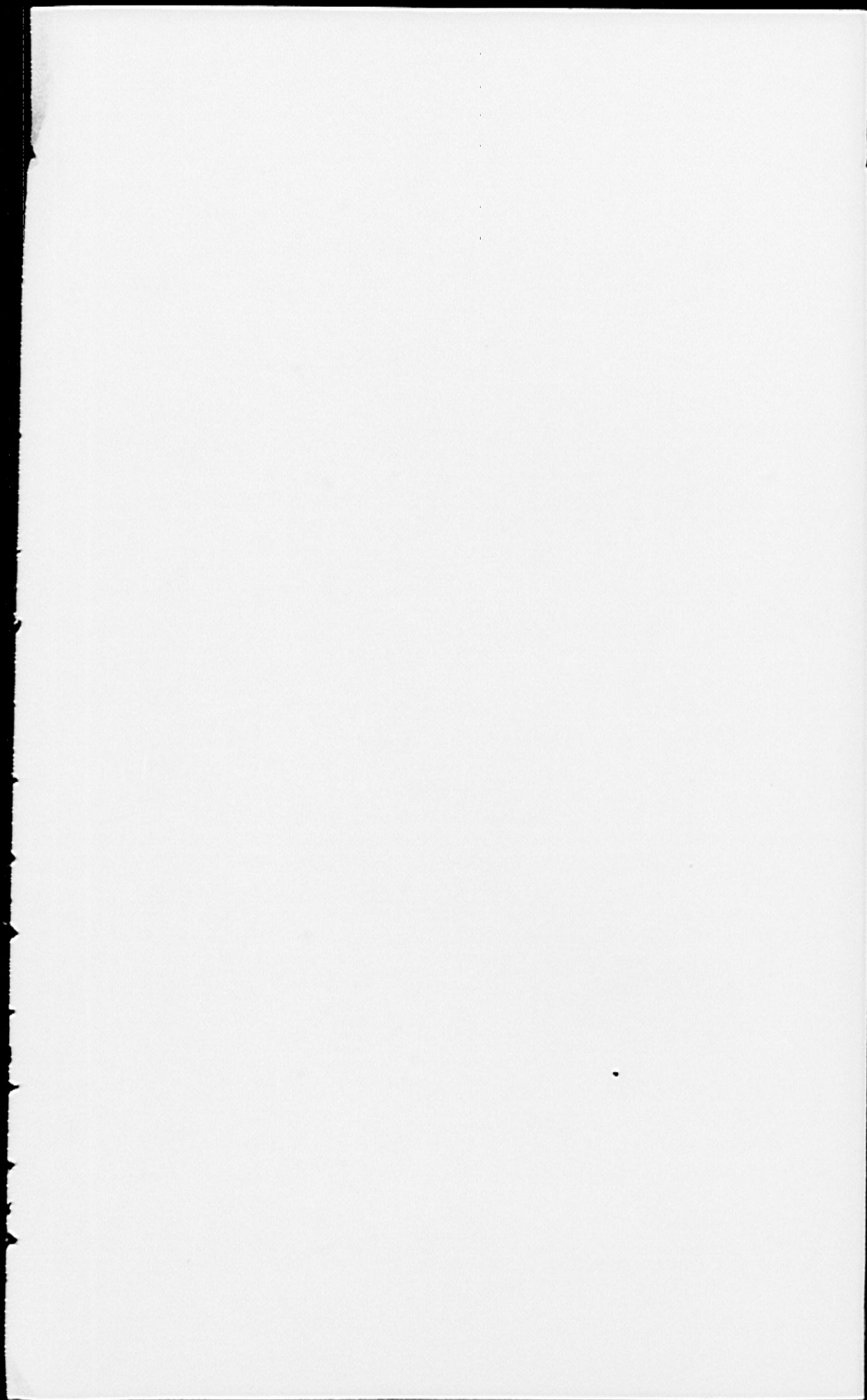
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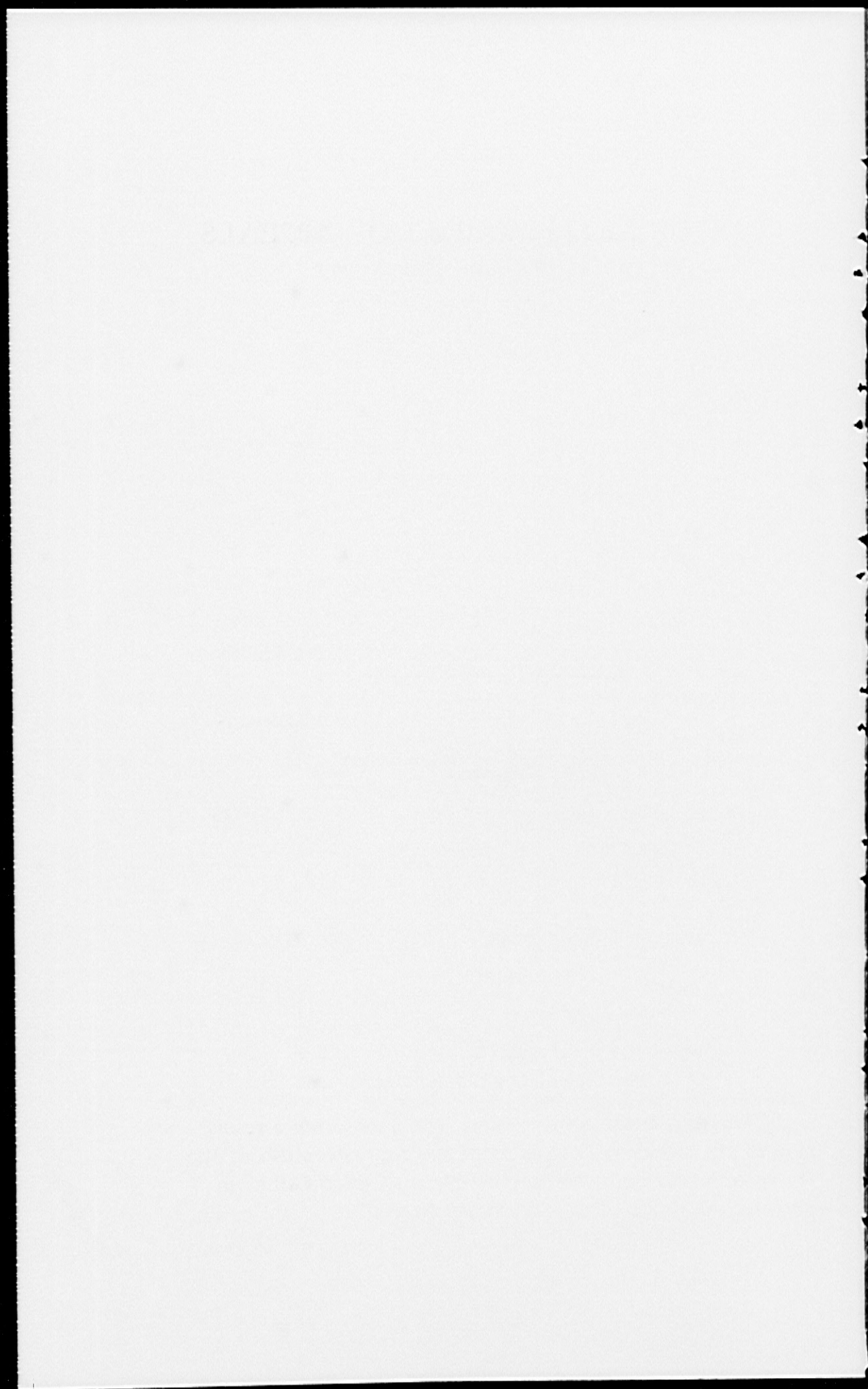
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Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

COUNTER STATEMENT OF ISSUES
PRESENTED FOR REVIEW

1. Was the lower court correct in not ordering a rescission of the shareholder agreement since a restoration of the status quo was equitably impossible and since Golin, in actuality, committed no breach whatsoever?

2. Was the trial court's exclusion of Scher from the courtroom during the testimony of the other witnesses properly within its discretion under the rule on witnesses?

3. Was the trial court correct in rendering a directed verdict for Golin on the defendants' counter-claim of libel?

SUMMARY OF THE ARGUMENTS

The fact that Golin did not breach his shareholder or employment contracts is presently on appeal before this court. It is thus contended that no breach occurred and the remedy of rescission is completely unjustifiable. Moreover, even if a breach had occurred, rescission should not be granted because restitution of the status quo is impossible, Golin having made contributions to the corporations, Physicians International Press, Inc. and World Medical Reports, Inc. far above his monetary contribution.

The exclusion of any witness, even a corporation officer, is a matter within the discretion of the court and is not to be altered on appeal absent a showing of a blatant abuse of authority by the trial court. Since there was no abuse of authority, the trial court's exclusion of Scher under the rule on witnesses was correct and was required for untainted testimony to be received.

It is for the court to determine whether a statement is libelous in the first instance and if the court does not find a statement capable of being libelous, it should direct a verdict against the complainant. A corporation is not libeled by statements directed at its shareholders, officers or employees and can only be injured in its business capacity. If a corporation, as in the present case, cannot prove a statement was capable of being libelous and cannot prove special damages to its business capacity, its claim for libel must fail.

ARGUMENT

I.

**APPELLANT-PLAINTIFF, GOLIN, COMMITTED NO
BREACH OF EITHER THE SHAREHOLDER OR
EMPLOYMENT AGREEMENTS**

As stated repeatedly in the original Brief filed herein by the defendants the trial court made a finding that Golin committed "... a fundamental breach going to the root of the contract" (Judge's Ruling, Tr. 8). The reasons cited by the lower court judge in making this statement are clearly not supported by the evidence or the law, or for that matter, the additional findings and conclusions contained elsewhere in the judge's ruling. Since this erroneous finding by the lower court judge constitutes the major contention for reversal, the plaintiff's original brief contains considerable detail on both the argument of the facts and law on this significant point. It can best be summarized as follows.

Prior to establishing the corporations, Physicians' International Press, Inc. and World Medical Reports, Inc., Golin, Scher and Pace entered into a shareholders' agreement and an employment contract. The two documents were executed separately and are complete and entire in and of themselves. That the shareholder agreement was intended as a distinct and final integration is evidenced conclusively by the phrase contained therein that "this agreement constitutes the entire agreement between the parties hereto . . .". The shareholder agreement provided for the distribution of shares, and the election of officers and members of the Board. The employment contract, on the other hand, provided the terms by which Golin and Pace would work as editors, and specifically provided that the contract could be modified or terminated at the end of a specified time, upon proper notice.

After having provided considerable talent, energy and labor to the establishment of the corporations, it became apparent to Golin that he could not continue to work for

the corporations as an editor due to conflicts in editorial philosophy between himself and Scher and Pace. For this reason, he submitted his resignation as editor to the corporations, effective on the natural date of termination of the employment contract. This resignation was accepted by Scher, as President of the corporations. Golin stood willing and able and attempted to complete the remainder of his employment contract, but was prevented and precluded from so doing by Scher and Pace.

At no time did Golin contemplate resigning as an officer and director of the corporations, nor did he desire to divest himself of his stock interest. His only desire was to cease being an editor of the magazines. He at all times wanted to remain involved and a part of the corporations as an officer, as a director and as a shareholder, and relying upon the terms of the agreements between the parties correctly assumed that he was assured of doing so.

The district court's ruling that a fundamental breach occurred was based on its erroneous assumption that the employment contract and the shareholder agreement were interdependent. This assumption was clearly wrong, if only because the shareholder agreement specifically stated that it was independent and complete in and of itself. There was no requirement in either the employment contract or shareholder agreement that ownership of stock and the rights coincident to ownership were dependent entirely upon the continued employment of the shareholder. In fact, since the employment contract expressly provided for its own termination, and since no requirement of a divestment of stock interest was attached to the termination of employment in either agreement, it can only be concluded that no such requirement was intended. By resigning as an editor in compliance with the express provisions of the employment contract, it is clear that Golin did not breach even his employment contract, and most certainly he did not breach the shareholder agreement.

II.

**RESCISSION WAS NOT ORDERED BY THE COURT
PRECISELY BECAUSE OF THE RECOGNITION OF
PLAINTIFF'S SUBSTANTIAL PERFORMANCE**

Despite its misinterpretation of the law and of the two contracts, the court did recognize that Golin's efforts under the contracts were too substantial to order a rescission. How could the court justify its calling the resignation "a material breach going to the root of the contract" in view of the following quote:

"this is not to say, however, that Golin forfeited all rights as a shareholder at the time of his resignation. He helped materially to get the newspapers under way, and he made a significant contribution to the success of the enterprise in its early stages. His editorial standards were exacting and his ideas helpful in launching the publications . . ." (Judge's Ruling, Tr. 13).

Even assuming, arguendo, that Golin had breached his contract, his breach would not be such as to justify a rescission, primarily because a restoration of the status quo would be equitably impossible. *United States v. Blair*, 193 F.2d 557 (10th Cir. 1952). Golin made a valuable contribution to the corporations which would be unconscionably ignored in rescinding the contract and restoring to him only his initial monetary investment. The remedy of rescission is "dependent upon balancing the relative interests involved, and in a case where the injured party has another and a complete remedy and where rescission will deprive the wrongdoer of rights which are his in spite of his wrong, a court of equity will not grant rescission. *Dabney v. Chase National Bank of the City of New York*, 201 F.2d 635 (2d Cir. 1952); cert. denied 346 U.S. 863 (1952) "The requirement in an action for restitution that the other party to the transaction should be placed in his original position exists to prevent enrichment by the rescinding party at the expense of the other and is limited by the reason for the

rule." *Furman v. Gulf Ins. Co. of Dallas*, 152 F.2d 891 (8th Cir. 1946).

Nothing would be more counter to the principles of the previously cited cases than to require Golin to forfeit the value of his labors and thereby give a windfall to unjust enrichment to those clamoring for rescission. The corporations are unable to even allege with the required particularity that they have suffered damages from Golin's action, much less being able to *prove* having suffered special damages. Their record of profits has increased unabatedly from their inception and as was observed by the court in *Block v. City of West Palm Beach*, 112 F.2d 949, 952 (5th Cir. 1940), "it is elementary that the mere breach of an agreement which causes no loss to plaintiff will not sustain a suit by him for damages, much less rescission."

Though the lower court erred in its interpretation of the law by finding that the plaintiff had committed a breach of the contracts, it correctly recognized fundamental considerations of equity and fairness when it refused to grant a rescissional windfall to an uninjured party. It is hereby contended that to hold that Golin breached his contracts is unsupported by the law cited either in this brief or the defendant's brief.¹ To bestow the fruits of his labors

¹The case most heavily relied on by the defendants is *Callinan v. Powers*, 199 N.Y. 268, 92 N.E. 747 (1910) and is treated as if it were the beginning and the end of law on the subject matter of contract rescission. It must be noted that this is a 1910 case and the general propositions relied upon by the defendants are nothing more than *obiter dictum*. Another case cited by the defendants as a "case quite close in point to the instant case" is *Maytag Co. v. Alward*, 112 N.W. 2d 654 (Iowa, 1962) which involves an employee who was to receive stock options as a result of working so many years under his employment contract. Basically he did not complete the employment period required and, therefore, was prohibited for exercising the stock options. Very obviously this case has no bearing on the present fact situation whatsoever. Golin had no stock options as he did not need any. He owned his stock outright long before he resigned. A close examination of the bulk of defendant's law reveals that the fact situations represented are not even remotely analogous to the present case.

gratuitously upon others is without the bounds of justice and conscience.

III.

THE DISTRICT COURT'S RULING TO EXCLUDE SCHER FROM THE COURTROOM DURING THE TESTIMONY OF OTHER WITNESSES WAS PROPERLY WITHIN ITS DISCRETION AND SHOULD BE UPHELD

The decision as to whether or not to permit witnesses to remain in the courtroom while other witnesses testify resides within the discretion of the trial court. Once the court has ruled, its decision should be regarded as conclusive, and should not be overturned absent a clear and convincing demonstration that the trial court manifestly abused its discretion to the overwhelming prejudice of one of the litigants. *Porrier v. Porrier*, 267 A.2d 390 (R.I. 1970); *Devlin v. Department of Labor and Industries of Washington*, 194 Wash. 549, 78 P.2d 952 (1938); *Xenakis v. Garrett Freight Lines, Inc.*, 1 Utah 2d 299, 265 P.2d 1007 (1959). No such showing was made by the defendants.

The fact that Scher was the President of the defendant corporations and was designated as the corporations' officer in charge of the litigation is not conclusive on the question of his exclusion and is but one of the factors the trial court had to consider in exercising its discretion. The rationale for permitting a corporate officer to remain in court is that a corporation, being only a legal entity, must act through its officers and agents, and that for a corporation to participate in a trial as a party to the litigation, it must be represented by its designee. To exclude the corporation's representative is thus tantamount to excluding the corporation itself, as a party to the suit. Even though the general rule is that a party to a suit should not be excluded, the rule is not iron clad, and under appropriate circumstances, a party may be excluded from the courtroom during the examination of witnesses. As the Georgia court stated in *King v. Faries*, 120 Ga. 393, 170 S.E. 2d 747 (1969).

"Where the plaintiff elected to call his witnesses before testifying himself, it was not error to exclude him from the courtroom during the testimony of two of the witnesses. The trial court has a wide discretion in administering the rule of sequestration of witnesses and no abuse is shown here even though the rule generally does not apply where the witness is a party." (Citations omitted) at 798.

In another noteworthy decision, the Utah court in *Xenakis v. Garrett Freight Lines, Inc.*, *supra* used the following language to indicate that even witnesses whose special knowledge is of aid to counsel may be excluded at the discretion of the trial court:

"Where witnesses are excluded, it is common practice to allow one witness, having special knowledge of the facts, to remain in the courtroom to advise with counsel concerning the progress and management of the trial. *It is not mandatory that this be done*, but the entire matter of exclusion of witnesses rests within the sound discretion of the trial court and his action will not be disturbed in the absence of a showing of clear abuse." (Emphasis added) at 1012.

The issue of whether a corporation's president who was designated as the corporation's officer in charge of the corporation's interests at trial could be removed under the rule excluding witnesses, the identical issue now on appeal, was decided in *United States v. 5 Cases, More or Less, Containing "Figlia Mia Brand,"* 179 F.2d 519 (2d Cir. 1950). In that case, the Second Circuit unequivocally held that the corporation's president could be excluded from the courtroom during the examination of witnesses in spite of the fact that he was officially managing the corporation's interest at the trial. The court tersely stated, "As the matter is clearly procedural, we shall follow the rule of universal application in federal courts that the exclusion of witnesses from the courtroom lies within the discretion of the trial judge . . . (Citations omitted)". (at 522).

Although defendants have cited *United Dentist, Inc. v. Commonwealth*, 162 Va. 347, 173 S.E. 508 (1934) in support of their position, a close examination of the language of the decision will illustrate that it is clearly consistent with the previously discussed precedent and was a sound legal basis for the trial court to base its decision upon. To quote the court:

"While the presence of witnesses during the trial of a civil action is not controlled by statute, there can be no doubt that the trial court, in the exercise of a sound discretion, has the power to limit the number of representatives each litigant is entitled to have remain in court during the examination of witnesses. Especially is this true when the requested representative is to be introduced as a witness. *Were the rule otherwise, it would give to the litigant whose witnesses remain in court the great advantage of having his witnesses cognizant of the testimony of each other, and the hazard of contradiction would be greatly minimized.*

It is true, of course, that a corporation can be present in court only by representation through its officers, or one of them. *But it does not follow that a corporation is entitled to stand upon a different footing from any other litigant.* In our opinion, the rule is correctly stated in *Cyclopedia of Law and Procedure*, vol. 38, p. 1371, in the following language:

"Where the party is necessarily absent his agent whose presence is required by counsel on account of his knowledge of the case, *should not* be excluded. Where defendant is a corporation it is not error to refuse to permit an officer or employee thereof to remain for the purposes of advising with counsel, unless it appears that he has been put in control of the litigation. *And where two officers of a corporation are witnesses, one of them may be put under the rule.*" (Emphasis added).

As is indicated above, witnesses are excluded to prevent their testimony from being tainted by the testimony of other witnesses. In the present case, nothing could be clearer than the fact that Scher's testimony would have been aided by his remaining in the court room and the possibility of contradiction between his testimony and that of the other witnesses would have been virtually precluded, to the unquestioned detriment of Golin. Recognizing this fact, the trial court refused to place a corporation upon "a different footing from any other litigant." *Id.* at 509. And as the trial court correctly pointed out, normally a corporations' officer in charge of the trial should not be excluded, just as a party to the litigation normally should not be excluded; yet, the court, by using the word *should* instead of *must* or *can*, unquestionably demonstrated that the question is discretionary. When the circumstances arise, it is entirely proper for the trial court to exercise its discretion to insure equity in the proceedings before it, even when to do so requires a corporation's designated officer to be excluded from the court. Finally, the court noted that where two officers of a corporation are witnesses, one may be excluded. The presence of Pace, who was both an officer of the corporations and a party to the suit, was thereby sufficient, in the trial court's opinion, to give the corporations adequate representations and justify the exclusion of Scher. Even further, co-counsel for the defendants, Julian Perlman, who was present throughout the trial, was not only corporate attorney from the inception of the corporations but also was a member of the Board of Directors of both companies and involved in their management.

IV.

**THE TRIAL COURT WAS CORRECT IN RENDERING
A DIRECTED VERDICT FOR GOLIN ON THE DEFEND-
ANT'S COUNTER-CLAIM OF LIBEL**

In an action for defamation, it is for the court to decide as a matter of law whether the words alleged to be defamatory can possibly be so interpreted. It is the jury's function, on the other hand, to determine whether words capable of a defamatory meaning are in fact defamatory as applied to the complainant. *Lane v. Washington Daily News*, App. D.C. , 85 F.2d 822 (1936 U.S.D.C.); *Albert Miller and Co. v. Corte*, 107 F.2d 432 (5th Cir. 1939). If the court rules, as it did in the present case on appeal, that the words claimed to be defamatory are not capable of a defamatory construction, then there is no question at all for the jury to determine and the verdict must go to the defendant. The *Restatement of Torts* at Sec. 614, comment b, expressed this legal principle as follows:

"In the determination of the question whether a given communication is defamatory, two questions may arise: first, whether the communication reasonably conveyed the meaning ascribed to it by the plaintiff (see Sec. 563), and, second, whether such meaning is defamatory in character (see Sec. 559). Under the rule stated in this Section, the court determines whether the communication is capable of bearing the meaning ascribed to it by the plaintiff and whether the meaning so ascribed and carried is capable of being defamatory. If the court decides against the plaintiff upon either of these questions, there is no further question for the jury to determine and the case is ended. If, on the other hand, the judge decides that the communication is capable of bearing a meaning which may reasonably be regarded as defamatory, there is the further question for the jury, whether the communication was in fact understood by the recipient thereof in a sense which made it defamatory."

Three federal district court cases illustrate the application of this rule. In *H. O. Merren and Co. v. A. H. Belo Corp.*, 228 F. Supp. 515 (N.D. Tex. 1964), the court granted defendants motion for summary judgment on the ground that the words the plaintiff claimed to be defamed by were not capable of being defamatory. The plaintiff, an English company, contended that the defendant had defamed it by publishing an article stating that the plaintiff was using a "legal loophole" to ship United States goods to Cuba and that the English government and the plaintiff had not cooperated to make the United States embargo of Cuba effective. Refusing to construe "legal loophole" as necessarily implying illegal activity, the court observed that language is not to be "given a strained interpretation nor the import which it might carry to a hypersensitive mind" (at 518) and held that as a matter of law no defamation had resulted. In *Kihniman v. Humble Oil and Refining Co.*, 312 F. Supp. 34 (E.D. Louisiana 1970), the court ruled as a matter of law in a motion for summary judgment that a statement that the plaintiff as an attorney was his client's "unwitting tool" was not capable of a defamatory meaning, and hence no issue for the jury arose. In making its ruling, the court stated "that whether the words used, are capable of a defamatory meaning" is a question of law for determination by the court, not a jury." (at 42). And finally, in *Hardboard Machinery Co. v. Coastal Products Corp.*, 289 F. Supp. 496 (M.D. Ga. 1967), the court again ruled as a matter of law that no libel was committed. There, the plaintiff had mailed letters to creditors to the effect that it had not yet paid its bills because it had not been paid by the defendant. In response, the defendant mailed its own letters to the effect that it did not owe the plaintiff money and was not responsible for the plaintiff's financial difficulties. The court, in rejecting the plaintiff's libel claim, refused to hold that the letters were libelous in and of themselves and rejected the allegation that the letters implied that the plaintiff was a prevaricator. Finding the

words in the letters incapable of the meaning ascribed them, the court found that there was no issue for the jury, "the court being unwilling to shirk its duty by creating an issue where none exists." (at 504).

V.

THE WORD ETHICAL AS USED BY GOLIN IS INCAPABLE OF A DEFAMATORY MEANING

When a word is susceptible to two or more possible definitions or meanings, the court is to determine as a matter of law whether the word could be understood as defamatory in the context used. Only if the court finds the word capable of a defamatory application is the jury to decide whether the word actually was understood in a defamatory sense. *Harkaway v. Boston Herald Traveler Corporation*, 418 F.2d 56 (1st Cir. 1969). In the present case, the trial court was confronted with two legitimate definitions of the word "ethical." On the one hand, ethical refers to a mode of conduct. On the other hand, it also refers to a variety of drugs. The claimant has alleged that the word ethical not only refers as used to a mode of conduct, but that it necessarily refers to unethical conduct. Golin, however, has asserted that he used the term ethical to refer to ethical drugs, as distinguished from proprietary drugs, since he hoped to initiate a new magazine which would solicit advertisements from companies producing ethical drugs. (April Tr. 43). The court thus was faced with a decision of determining as a matter of law whether ethical, in the context used by Golin, was capable of being defamatory. The court's decision, in other words, was to determine whether the word was capable only of referring to drugs, in the sense directly defined by the dictionary, or whether the word was capable of referring both to drugs and to improper, unprincipled conduct. If it found the latter, the matter would properly have been a jury question. But upon a consideration of the word in the context in which it was used, the court found that the word "ethical" could

only refer to prescription drugs and could not be in any sense capable of defaming the claimant. The court properly removed this issue from the jury.

VI.

**THE PHRASE "ILLEGALLY DIVERTING MY MAIL"
DOES NOT LIBEL THE CLAIMANTS**

Subsequent to the plaintiff's resignation and after he had left the corporation's employment, he wrote a letter to a Dr. Soper containing the following statement:

"Even before the publishing corporation illegally breached my contract my mail was being illegally diverted as others in the office were hastening to assume control." (Def. Exh. 87).

The trial court was equally correct in ruling that this sentence was incapable of libeling the claimant. It must be remembered that the claimant is the two corporations, Physicians International Press, Inc. and World Medical Reports, Inc. and not their shareholders, officers, directors or employees. It is obvious that the phrase "illegally diverting my mail" refers to "others in the office" and not the corporations. Consequently, it was entirely proper for the trial judge to rule as a matter of law that the phrase was incapable of libeling the defendants and, therefore, was not a question for the jury.

The failure to distinguish who was defamed, that is, the corporations or their officers, directors or shareholders, was prolix in the claimant's presentation. The trial judge noted:

"If you had an individual being allegedly libeled, I think you would have something maybe in your favor, but I am not so sure that you are too strong in connection with the publication being libeled." (April Tr. 1152; 1153).

The court was not stating that a corporation cannot be defamed, rather it was noting that there was no indication

that the words alleged to be defamatory were capable of applying to or defaming the corporations as distinct entities.

Several excerpts from the transcript will illustrate the court's thought in making that statement. The following are exchanges between the court and the defendants' counsel (April Tr. 1148-1152):

THE COURT: Who did he say was illegally diverting the mail?

MR. SHLAKMAN: The Soper letter is Exhibit 84, I believe. It is right here.

THE COURT: Read that letter.

MR. SHLAKMAN: (Reading) "Even before the publishing corporation"—that is my client—"illegally breached my contract"—

THE COURT: What company was that?

MR. SHLAKMAN: Ob. Gyn. News, Pediatric News and Diagnosis News.

THE COURT: Go ahead.

MR. SHLAKMAN: "Even before the publishing corporation illegally breached my contract my mail was being illegally diverted as others in the office were hastening to assume control."

THE COURT: Who were the others?

MR. SHLAKMAN: Your Honor, the evidence is that the man went on vacation and for the week he was on vacation Mr. Pace had his mail delivered to the only office that was then open, that Mr. Pace opened his own mail and sent Mr. Golin's mail right back downstairs. That is the evidence in the case.

* * * * *

THE COURT: You are saying that this libeled the newspaper, the publication?

MR. SHLAKMAN: They are corporate publishers, the people that are libeled; yes. A newspaper is either ethical or unethical, depending upon the people who are in control or responsible for it.

THE COURT: If you had an individual being allegedly libeled, I think you should have something maybe in your favor, but I am not so sure that you

are too strong in connection with the publication being libeled.

* * * * *

As can be seen from the previous excerpts, the court questioned whether the phrase "illegally diverting my mail" was capable of referring to the corporation. Counsel for claimant's own statement that a corporation is ethical or unethical depending on the people who run it illustrates that he was unable himself to make a distinction between the corporations and their officers, directors, and shareholders. It was for this reason that the trial judge noted at the end of counsel for claimant's argument that were there an individual being allegedly libeled, his ruling might be different.

VII.

THE DEFAMATION OF AN OFFICER, DIRECTOR OR SHAREHOLDER OF A CORPORATION IS NOT A DEFAMATION OF THE CORPORATION

It is the law that a defamation of an officer, director, or shareholder of a corporation is not a defamation of the corporation. This point was clearly brought out in *Cal-Therm Industries v. Dun & Bradstreet*, 75 F. Supp. 541 (S.D. N.Y. 1948), where the court ruled that a credit report published by the defendant indicating that the principal shareholder and officer in a closely held corporation was financially unsound was not libel to the corporation itself, even though the corporation was operated and controlled by that individual. The court used the following words:

"The alleged libel contains financial statistics, not of the plaintiff corporation, but of one of its officers, stockholders and promoters of the business. "A corporation cannot maintain an action for slander or libel upon words spoken or published solely of and concerning its officers or members."

Plaintiff in order to sustain his complaint without allegations of special damage must show that the

alleged libel contains a false statement or charge concerning itself, and not one of its officers, promoters or principal stockholders.

Since the complaint contains only general allegations of damage, the Court must determine whether or not the report complained of was in and of itself libelous."

In another case tried on the same issue, the court in *Novick v. Hearst Corporation*, 278 F. Supp. 277 (D. Md. 1968), again held that a corporation is not defamed by statements made of and about its stockholders, officers, and employees and stated that "Authorities dealing with the subject generally hold that an imputation defamatory to stockholders, officers or employees of a corporation does not constitute defamation of the corporation itself in the absence of an allegation of special damages." (at 279). On the question of what special damages the corporation had suffered, claimant's counsel responded as follows (April Tr. 1151):

MR. SHLAKMAN: He showed trips that he had to take. He talked about mental anguish. One of the items of damages in the instructions when one charges the jury in the District of Columbia are such sum as will fairly compensate him, the plaintiff, for the mental anguish, distress, humiliation and physical injuries, if any, you find resulting. Mr. Scher testified to that. He testified to the harm in the advertising community coming from these resignations on the board of directors.

Yet as the court noted in the *Novick* case, *supra*, "Allegations of special damages, where required, must be stated with particularity, including either loss of particular customers by name or a general diminution of business and extrinsic facts showing that such special damages were the natural and direct result of the false publication." (at 279). This the claimant failed to do, since no specific customers were lost and business never ceased expanding. The general allegation of injury by the resignation of a Board member and a dimin-

ished reputation in the advertising community is clearly and completely insufficient. Moreover, the mental anguish, distress, and humiliation of Scher was certainly not an element of injury to the corporation "since a corporation has no reputation in the sense that an individual has" and "it is only with respect to its credit, property or business that a corporation can be injured by a false publication." *Novick v. Hearst Corporation, supra*, at 279.

VIII.

SINCE THE CLAIMANT COULD NOT PROVE LIBEL PER SE OR SPECIAL DAMAGES, GOLIN WAS ENTITLED TO A DIRECTED VERDICT

The claimant corporations were required to prove either that the allegedly defamatory language in Golin's letters was libel per se or that they suffered special damages as a result of the letter's publication. Otherwise, they could not recover. *Rose v. Indianapolis Newspapers*, 218 F.2d 227 (7th Cir. 1954).

In the present case, they were able to do neither. On the issue of libel per se, the trial court properly ruled as a matter of law that the language used by Golin in the letters was not possible of defamatory application. Since the corporations actually were not damaged or injured at all, it was impossible for them to even allege with the required particularity any special damages, much less prove them. These two factors in mind, the trial court was led to the only conclusion possible—that Golin was entitled by law to a directed verdict.

CONCLUSION

Not having committed any breach of his contract, Golin should not be penalized by a rescission of the shareholder agreement since a restitution of only his monetary contributions by itself would serve to unjustly enrich the defend-

ants with the valuable contributions made by Golin to the founding of World Medical Reports, Inc. and Physicians International Press, Inc. Scher, though an officer of the defendant corporations, was properly excluded by the trial court in an exercise of its discretion in invoking the rule on witnesses so as to prevent Scher's testimony from being tainted. The counter-claim of libel was correctly denied on a directed verdict because the defendants were unable to prove the alleged libel was defamatory or had caused special damages. For these reasons, it is respectfully submitted that this court should deny the defendants' appeal.

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